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No. 10610.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES GOODWIN POWELL and ANNA STRACHAN POWELL, husband and wife,

Appellants,

vs.

PETER J. WUMKES,

Appellee.

APPELLEE'S BRIEF.

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Preliminary Statement.

The "Statement of the Case" contained in Appellants' Opening Brief (pp. 2 to 6) is substantially a correct statement of the factual background upon which Appellants seek to reverse the judgment of the District Court with the following exceptions consisting of certain corrections and additions. The first correction is the manner in which the so-called "opportunity" of examining witnesses and presenting evidence is presented by the Appellants in the "Statement of the Case": the next correction is the assertion by the Appellants that at the hearing of May 18, 1943, the Appellee produced no evidence.

With respect to the said "opportunity" to examine witnesses and produce evidence, the "Statement of the Case" is more eloquent in what it leaves unsaid than in those matters which the Appellants present as conclusions from what actually occurred. The transcript of the record shows affirmatively by the Commissioner's Certificate that the Appellee was by the Commissioner "asked if he cared to examine each witness produced; was asked if he had any evidence to introduce. In each case he answered in the negative and refused to ask any witness any questions or to testify himself or produce any evidence" [Tr. p. 44], this apparently being the conclusion of the Commissioner as to what actually occurred, but the Commissioner in his zeal to explain the "fairness" of his hearing, also inserted in the Certificate the evidence from which his said conclusion was drawn. It is shown in the following words of the Commissioner:

> "* * * (After the withdrawal of Russell Goodwin as attorney for Peter J. Wumkes, as hereinbefore shown, this Commissioner said: 'This is the time and place fixed for the hearing of petition to determine value of debtor's real property. Are you ready to proceed?' No negative answer was interposed.)" [Tr. p. 46.]

The Commissioner first correctly recognized the danger of proceeding without Mr. Wumkes being represented [Tr. p. 43], then fell into the error of permitting said counsel to withdraw [Tr. p. 44] without giving the Appellee a chance to obtain other counsel, and proceeding without advising Mr. Wumkes concerning his rights to have coun-

sel, to seek or obtain a continuance for the purpose of obtaining counsel, or himself undertaking to protect the said creditor's rights, as, under such circumstances, he may well be duty bound to do, and without any substitution of the Appellee *in propria persona* for Russell Goodwin, Esq.

Parenthetically, we challenge the Commissioner's recital contained in his Findings of Fact, Conclusions of Law [Tr. p. 65] and Decision [Tr. p. 75], stating that the Appellee Peter J. Wumkes appeared "personally and through his attorney, Russell Goodwin, Esq.," as a litigant either appears personally, that is to say: *in propria persona* or by counsel, and never in both capacities. (Rules of U. S. District Court, Rule 1 (d), (e), (2), (3).)

It appears that at the hearing of May 18, 1943, had before the Commissioner, although the Commissioner's Certificate states that "no evidence to sustain allegations of petition for rehearing" was introduced, nevertheless, the Commissioner took some wholly irrelevant testimony from Russell Goodwin, Esq., the attorney whom he permitted to withdraw from the proceeding during the previous hearing, and it appears further by the Transcript that although the Appellee was ready with testimony bearing upon the matters in issue, the Commissioner refused to hear the parties other than the attorney who had previously withdrawn. [Affidavit of Donald P. Nichols, Tr. p. 119.]

Three additional facts which are excluded from the "Statement of the Case" contained in Appellants' Opening Brief, require attention:

First: It appears that the Commissioner made a rent order under Subsection (s) of Section 75 of the Bankruptcy Act on June 16, 1941 (App. Op. Br. p. 3), consisting of one-fourth of the gross proceeds of the income produced on the agricultural real property of said Appellants [Tr. p. 28], and that none of said rent was paid [Tr. p. 28], and that the Commissioner refused to give Appellee any accounting or any statement concerning any of said monies [Tr. p. 119] and his order granting the Appellants the right to obtain the property free and clear of the $12,000.00 existing encumbrance for the sum of $3,900.00, failed to take into account any portion of said rent. [Tr. pp. 75 and 76.]

Second: Both of the Appellants themselves considered the value of the farm upon which the Appellee, Peter J. Wumkes, held his deed of trust, to be the sum of $8,000.00 [Tr. p. 8], and such value was placed upon said property under oath by each of said Appellants with H. R. Griffin, counsel for the Appellants taking the oath of said Appellants to the accuracy and correctness of such value. [Tr. p. 15.]

Third: Either by reason of the general change in economic conditions with a substantial increase in prevailing prices for farm products, or the sudden and unexpected improvement in the condition of this "marginal" grove, resulted in a net packinghouse return to the Appellants on the Wumkes' grove for the season 1941-42 in the sum of $3,287.06. [Tr. pp. 70-100.]

ARGUMENT.

The District Court Did Not Err in Reversing the Commissioner's Order of April 9, 1943.

(A)

The District Court, in Determining the Correctness and Fairness of the Commissioner's Order of April 9, 1943, Had Before It Facts Which the Commissioner Also Had Before Him, but Which He Ignored and Failed to Consider.

First: The value as placed upon the real property in question by both of the Appellants as late as July 20, 1940, which appeared to have been the sum of $8,000.00.

Second: The fact that the ranch for a period of four years continually improved in the yield until in the season of 1941-42, it produced oranges, giving to the Appellants a net packinghouse return of $3,287.06.

Third: The general improved economic conditions affecting the orange industry generally, of which the Commissioner must have known, and which constituted a portion of the facts of such general notoriety, as not to require proof, but which the Commissioner ignored and failed to consider.

Olson v. United States, 292 U. S. 246, 257, 78 L. Ed. 1236, 1245.

(B)

The District Court Had Before It on Such Review Additional Facts Which Supported Its Action in Reversing the Judgment of the Commissioner and Justified the District Court in Exercising Its Discretion in Remanding the Case to the Commissioner for Further Proceedings.

First: The Appellee introduced the sworn testimony of Mr. L. A. Turner, engaged in the orange business since 1925, showing the value on March 1, 1943, to have been $8,500.00. [Affidavit of L. A. Turner, Tr. p. 109.]

Second: The Appellee introduced the sworn testimony of Peter J. Wumkes showing, among other things, that the Appellants, James Goodwin Powell and Anna Strachan Powell, considered the property to have a value of $13,-500.00, in the year 1938, on which date he sold to said Appellants the said parcel of property for $13,500.00; $2,500.00 cash, down payment, and the balance secured by trust deeds against the property, and that said creditor has received no payments of any kind on account of the rental order made by the Commissioner on the 16th day of June, 1941, and that he considered the value of the property in 1943 to be the sum of $10,000.00. [Affidavit of Peter J. Wumkes, Tr. pp. 116-117.]

Third: The Appellee introduced the sworn testimony of Donald P. Nichols that the Commissioner refused to take any testimony on the Appellee's petition for reappraisal of the property, and that the Commissioner refused to give any statement or accounting whatsoever, and further refused to make any statement that he had as a matter of fact paid nothing on account of the rental monies received, or ordered paid, by him. [Affidavit of Donald P. Nichols, Tr. p. 119.]

Fourth: The Appellee also introduced the sworn testimony of K. C. O'Bryan, President of Southern Citrus Association, owner of numerous citrus properties in the vicinity, who placed the value of the grove at $8,000.00, and was incidentally willing to pick up a bargain by offering $6,500.00 cash therefor. [Affidavit of K. C. O'Bryan, Tr. p. 113.]

(C)

The Applicable Law.

General Order No. 47, established by the Supreme Court pertaining to hearings by referees, as amended February 13, 1939, provides:

> "Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. The judge after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may re-commit it with instructions."

Apart from the propriety of the Commissioner granting to the debtors the right to obtain title to the real property upon which the Appellee held an encumbrance in excess of $12,820.15 [Tr. p. 4], for the sum of $3,900.00 [Tr. p. 76], at a time when no rental payments had been made (*In re Ryder,* 40 Fed. Supp. 882), the Courts have in numerous decisions affirmed and reaffirmed the power of the District Court in adopting or refusing to adopt the findings of a referee on the question of value.

In re Byrd Coal Co., 83 Fed. (2d) 190;

In re West Produce Corp., 118 Fed. (2d) 274;

In re Duvall, 103 Fed. (2d) 653.

While there can be no question that the District Court may act improperly in substituting its judgment for that of the referee where he does not receive any further evidence (*Dunsdon v. Federal Land Bank of St. Paul,* 137 F. (2d) 84), and wherein he is not convinced that the Commissioner's finding as to value is clearly erroneous (*Equitable Life Assur. Soc. etc. v. Carmody,* 131 F. (2d) 318), nevertheless, it appears that the District Court is not "utterly helpless in any case to deal with a specific situation, simply because the record submitted to him on review meets the mechanical tests and standards" provided in the statute and expounded in the decisions. *(Dunsdon v. Federal Land Bank etc., supra.)* The Circuit Court correctly recognizes the pernicious results that may follow the adoption of the rule urged by the Appellants herein by stating:

> "Situations may exist where, in the interest of justice, he may soundly exercise a discretion to receive or require additional evidence in connection with a review of a conciliation commissioner's order, and determine from the entire record thus before him whether a correct result has been reached."
>
> *Dunsdon v. Federal Land Bank, supra.*

There can be no comfort to the Appellants in either of the cases that they so heavily rely upon to reverse the order of the District Court. *(Dunsdon v. Federal Land Bank* and *Equitable Life Assur. Soc. etc. v. Carmody, supra.)* Indeed, it may not be amiss to recognize the distinction that exists between the powers and duties of the District Court in acting upon a review of the Referee's findings and the Circuit Court, in passing upon the correctness of a District Court's determination.

The Circuit Court of the Eighth Circuit, in the case of *Rait v. Federal Land Bank of St. Paul,* 135 F. (2d) 447, states the distinction as follows at page 540:

> "* * * But where, from a review of the record and from such other proceedings as may be had before him, the district judge, on the basis of the principles referred to, is clearly convinced that the conciliation commissioner in such a situation has acted arbitrarily and without proper regard for the evidence, or that he has otherwise plainly and prejudicially erred, there can be no question as to his right to modify the conciliation commissioner's report or order, or to set it aside and receive further evidence, or to recommit the matter to the conciliation commissioner with instructions."

And at page 541:

> "* * * Our only power and duty in the situation presented here are to test whether the result which now has been reached by the district judge's exercise of his authorized functions is itself clearly erroneous. Rule 52(a), Federal Rules of Civil Procedure, 28 U. S. C. A., following section 723c. On the record before us, we cannot declare the value fixed by the district judge to be clearly erroneous. The fact that some other equally sustainable result might have been reached on the evidence is beside the point."

The rule applicable following the reversal of a referee's decision by the District Court is that the decision of the District Judge is presumptively correct.

Wilson v. Hall, 81 Fed. (2d) 918.

The "substantial evidence" rule used in determining an appeal from the District Court has no application in the

exercise of the discretion vested in the District Judge on review of a referee's determination.

In re Duvall, 103 Fed. (2d) 653.

Appellee respectfully submits that in the state of the record herein shown, the District Court correctly exercised a sound discretion in reversing the decision of the Commissioner in this respect, and remanding the matter for further consideration.

Appellee could not present any better argument than the words of the Circuit Court in the case of *Kauk v. Anderson,* 137 Fed. (2d) 331, at pages 333 and 334, wherein it states:

> "The district judge in a case such as this must first decide whether the conciliation commissioner has competently tried and competently determined the issue of value. If he has, his determination should stand. If he has not, then the district judge must decide whether to modify the commissioner's valuation upon the evidence in the record, whether to set the order aside and receive further evidence, or whether to recommit the matter to the conciliation commissioner with instructions. * * * The record on review may afford a sound and sufficient basis for a determination of value by the district judge and therefore justify a modification of the commissioner's valuation. Unless the record does furnish such a basis, we think that the proper course for the district judge to pursue is either to take additional evidence and then determine the issue from the evidence as supplemented or to remand the case to the commissioner with directions to retry the issue of value, pointing out to him the errors which invalidated his previous determination."

The District Court Did Not Err in Reversing the Commissioner's Order of May 18, 1943.

If the District Court, in the exercise of sound discretion, correctly reversed the order of April 9, 1943, it likewise correctly used its discretion in reversing the order of May 18, 1943. It is elementary that the courts will favor the determination of disputed questions of fact on the merits rather than by default.

Underwood v. Underwood, 87 Cal. 525;

Douglas v. Todd, 96 Cal. 655;

O'Brien v. Leach, 139 Cal. 220;

Stone v. Williams, 43 Cal. App. 490;

Bruskey v. Bruskey, 4 Cal. App. (2d) 472;

Kent v. County Fire Ins. Co., 27 Cal. App. (2d) 340;

Re Moreland's Estate, 49 Cal. App. (2d) 484;

Potts v. Whitson, 52 Cal. App. (2d) 199;

Grady v. Donohoo, 108 Cal. 211;

Marshal v. Holmes, 141 U. S. 589, 35 L. Ed. 870.

In fact, under the record submitted in the instant matter, it can reasonably be questioned whether the Commissioner complied with the constitutional mandate of due process.

> "A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken."
>
> 12 *Amer. Juris.* 303.

"A person has the right to be present at the hearing in person and represented by counsel. The right to a hearing includes the right to aid of counsel."

12 *Amer. Juris.* 307.

The shocking result should of itself have warned the Commissioner that the "fairness" and "impartiality" which should be the watchword of judicial determination, was probably lacking.

Apart from these considerations, the petition for re-appraisal was addressed to the Commissioner, both as a request for a new trial and as relief from the judgment or order of the Commissioner upon the mistake, inadvertence, surprise and excusable neglect of the Appellee under Rules 59 and 60 of the Rules of Civil Procedure. Under the Rules of the District Court, as they then existed, the general language of Rule 59 was not necessarily limited to the two grounds mentioned by the Appellants (App. Br. p. 9), but also (1) any irregularity in the proceedings * * * or an abuse of discretion by which the losing party was prevented from having a fair trial, (2) newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial. Either of these grounds should have been accepted by the Commissioner, as obviously the permitted withdrawal of the Appellee's counsel during the hearing, without giving Appellee an opportunity to obtain other counsel, constituted an abuse of discretion by the Commissioner, and the requested additional hearing, showing the secured lien of the Appellee

to be in excess of $14,000.00 [Tr. p. 40], and the original appraisal on the 24th day of November, 1940, to have been $5,200.00 [Tr. p. 38], the suggested "bargain price" purchase offer of $5,500.00 by the Orange Belt Fruit Distributors [Tr. p. 119], indicated to the Commissioner that a mistake had been made, and that the Appellee had newly discovered evidence material to the issue which he could not have produced at the "expedited" proceeding of April 9, 1943.

These grounds have been recognized by the Federal Courts as constituting adequate grounds to grant a new trial.

> "* * * We are not prepared to hold that the trial judge may not, in the exercise of a sound discretion, at the instance of a party or on his own motion, set aside a verdict or grant a new trial, when he is convinced that, because of some accident, mistake, or misfortune in the conduct of the trial, a new trial is necessary to prevent a failure of justice."
>
> *Norton v. City Bank & Trust Co.*, 294 Fed. 839, 843;
>
> *Kithcart v. Met. Life Ins. Co.*, 119 F. (2d) 497.

Rule 60 of the Rules of Civil Procedure is based upon the third and fourth paragraphs of Section 473 of the California Code of Civil Procedure, and the principles governing the exercise of the Court's discretion are correctly stated in 14 *Cal. Jur.* at page 1075 as follows:

> "From the earliest history of the state to the present time it has been held that the power vested in the

trial courts by section 473 of the Code of Civil Procedure should be freely and liberally exercised to the end that they might mold and direct their proceedings so as to dispose of cases on their substantial merits and without unreasonable delay, regarding mere technicalities as obstacles to be avoided rather than as principles to which effect is to be given in derogation of substantial right. The policy of the law is to have every litigated case tried upon its merits; and it looks with disfavor upon a party who, regardless of the merits of his case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary. The discretion of the court ought always to be exercised in conformity with the spirit of the law and in such manner as will subserve rather than defeat the ends of justice."

Accident, surprise and mistake are well recognized reasons for the granting of relief from a judgment or decree.

31 *Amer. Juris.*, Secs. 741, 742 and 743.

"The rule that an attorney's negligence may be imputed to his client and prevent the latter from relying on that ground for opening or vacating a judgment, does not necessarily prevail in the event of an attorney's abandonment of or withdrawal from the case. * * * The rule that the granting or refusing of an application to open or set aside a judgment is, in general, within the sound discretion of the trial court has been applied, or at least recognized, in numerous cases in which the withdrawal from or abandonment of the case by an attorney of one of the

parties was the ground interposed for opening or vacating the judgment."

31 *Amer. Juris.,* Sec. 753.

See

Adams v. Rathbun, 14 S. D. 552, 86 N. W. 629;
Simpkins v. Simpkins, 14 Mont. 386, 36 Pac. 759;
People v. Schulman, 299 Ill. 125, 132 N. E. 530.

Conclusion.

In conclusion it is respectfully submitted that the action of the District Court in reversing the Commissioner and remanding the matter to him for further evidence and determination was in the sound discretion of the judge of the District Court, and that the Court's action was, both in the interests of justice and to prevent a miscarriage of justice, supported by the rules governing the proceedings and the law applicable thereto.

Respectfully submitted,

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